Filed 11/21/08 Klinck v. Perelmutter CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THOMAS KLINCK et al., Plaintiffs and Respondents, v. DANIEL PERELMUTTER et al., Defendants and Appellants.	B194188 (Los Angeles County Super. Ct. No. BC284192)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tricia Ann Bigelow, Judge. Affirmed.

Steiner & Libo and Leonard Steiner for Defendants and Appellants.

Law Offices of Kenneth B. Dusick and Kenneth B. Dusick for Plaintiffs and Respondents.

Daniel and Mary Lou Perelmutter (defendants) appeal from a judgment granting Thomas Klinck and Peter Kratz (plaintiffs) easement rights over a portion of the Perelmutter property bordering the driveway which provides access to plaintiffs' garage and house. The trial court found plaintiffs have an implied easement, a prescriptive easement, and an easement by necessity. Defendants argue the court's statement of decision is not adequate as to the last two theories. As to implied easement, defendants contend the trial court employed the wrong standard, relied upon speculative expert testimony, and lacked a legal or factual basis for its conclusion. We find no basis to reverse as to implied easement. Defendants also argue the easement awarded by the trial court amounted to a possessory interest. We disagree. In light of our conclusion that plaintiffs proved their rights to an implied easement, we need not and do not reach defendants' arguments about the adequacy of the statement of decision and the alternative easement theories.

FACTUAL AND PROCEDURAL SUMMARY

Following the close of evidence at trial, the parties entered into a joint statement of undisputed facts, which is the source of much of this factual summary. Because the historic use of the properties bears on the resolution of the easement claims before us, we begin with the history of the driveway and the properties for which it provides access.

A. History of the Parcels

1. The Original Easement

The dispute centers on the rights to use a driveway on land off of Woodrow Wilson Drive, which curves through a neighborhood in the Hollywood Hills. As relevant to this action, initially there were four parcels, denominated parcels 1, 2, 3, and 4. Parcels 1 and 2 were next to each other on the northern side of the area, with Woodrow Wilson Drive forming the northern or western edge of those parcels. Parcel 3 was a long rectangle which ran from Woodrow Wilson Drive, south along the eastern side of parcel 2 and parcel 4. Parcel 4 was irregular, south of parcels 1 and 2 and west of parcel 3. Woodrow Wilson Drive formed the western edge of parcel 4.

In 1939, an easement deed was recorded between the adjacent property owners to create and preserve adequate means of ingress and egress at all times to parcels 2, 3, and 4 "over a strip of land 20 feet wide in said Parcel 4, extending from at or near the Southeast corner of said Parcel 4 in a general Northwesterly direction to Woodrow Wilson Drive at or near the Northwest corner of said Parcel 4, *as the strip now is laid out and improved*."[1] (Italics added.) The driveway described by this easement ran along the southern border of parcel 1, across the width of parcel 4, to the edge of parcel 3. It did not provide access for parcel 2.

When the easement deed was recorded on May 19, 1939, there were no structures on parcel 4; it was vacant land with no house or garage. In 1940 or 1941, a house and garage were built on parcel 4 (now plaintiffs' property). The entrance to the garage is flush with the driveway easement. The house is up a slope from the garage and is accessed by sets of stairs on either side of the garage. Of the properties that border the driveway, plaintiffs' garage is the only one that sits immediately on the edge of the driveway. The other properties have their own private driveways leading up to their garages.

2. 1951 Subdivision & Easement

Between 1940 and 1951, the Mitchells acquired parcel 4. In 1951, by joint tenancy grant deed, they subdivided parcel 4. The Dietrichs bought the lot with the house and garage already on it, referred to as parcel A, now owned by plaintiffs (7666 Woodrow Wilson Drive; we refer to this lot as plaintiffs' property). The Mitchells retained ownership of the southern and western portion of parcel 4, referred to as parcel B (7668 Woodrow Wilson Drive). It is undisputed that the northeast boundary of parcel B runs 10 feet from the entrance to plaintiffs' garage. The effect of this subdivision was that plaintiffs' property has no frontage on Woodrow Wilson Drive, although the other parcels served by the driveway easement do.

---

[1] Other easement rights not relevant to this action were also recorded.

Several weeks later, in March 1951, an agreement for easement was executed.[2] Under this easement, the Mitchells, owners of parcel B, retained the right to use the driveway easement recorded in 1939. As we explain below, for 20 years (1940 or 1941 to 1961) the house and two-car garage on plaintiffs' property were the only structures on the original parcel 4.

3. Plaintiffs' Purchase of 7666 Woodrow Wilson Drive

The Dietrichs were plaintiffs' predecessors in owning 7666 Woodrow Wilson Drive. In a 1985 probate sale, plaintiffs purchased that property, which included the house and garage built in 1940 as the first structures on parcel 4. In 1985, the property owned by defendants had not yet been created by further subdivision.

4. Subdivision of Parcel B

In 1961, John Tolley built the first house on parcel B (7668 Woodrow Wilson Drive) which he acquired in 1955.[3] In order to obtain the building permit, Tolley built a carport in front of his house for off street parking abutting Woodrow Wilson Drive. It is undisputed that since the construction of the Tolley house, the frontage of that property has "laid on Woodrow Wilson Drive."

The original Tolley property (parcel B) was subdivided in 1976. The Tolleys sold the southern portion of the parcel, including the home they had built, which became 7670 Woodrow Wilson Drive. This is now defendants' property, and for clarity we refer to it

---

[2] The easement stated: "'This Agreement concerns that parcel of real property shown as "Parcel Number Four," on record of Survey . . . . Said Parcel Four being now divided, on or about date concurrent herewith, and that part of Parcel Four to be shown hereafter as Parcel A being sold concurrently herewith by owners, Clinton H. and Naomi H. Mitchell, to the buyers, Robert and Betty P. Dietrich; this Agreement of buyer to seller witnesseth: Note is taken of an agreement for easement of ingress and egress now of record concerning said parcel Four, in Book 16579 Page 326; and perpetual rights of joint use of such easement is hereby granted *by the buyer of Parcel A, for the use of the seller with respect to Parcel B, and to all successors in interest therein*.'" (Italics added.)

[3] We adopt the parties' terminology and refer to parcel B as "the original Tolley property."

as such.[4] Tolley testified that he included the Disputed Area within the boundaries of the new lot at 7670 Woodrow Wilson because it was the only way to obtain permission for the subdivision by satisfying square footage requirements for the new lot. The remainder of the original Tolley property (7668 Woodrow Wilson Drive) was retained by the Tolleys.

5. The Disputed Area

This action concerns the rights of plaintiffs and defendants to the use of a Disputed Area on defendants' property which is located in the area of the driveway extending across from plaintiffs' garage. It begins 10 feet from the face of plaintiffs' garage. Retaining walls on defendants' property support part of the Disputed Area. A gully runs between those retaining walls and defendants' house. It is uncontested that the Disputed Area has materially the same dimensions today as it had in 1985 when plaintiffs purchased their property.

The parties disputed the origin of this area, whether all of it was originally paved or not, and the historic use of the area. Undisputed fact No. 15 states: "Between the construction of [plaintiffs'] residence and garage (within a reasonable period of time from the issuance of a permit for their construction in 1940) and the division of parcel 4 in 1951, the area in front of and to the south/southwest of the Klinck Garage including the Disputed Area, gully and south/southwesterly boundary of the [defendants'] Property were all included in Parcel 4 which was owned and occupied by the owner of the [plaintiffs'] Property." Plaintiffs have never paid taxes for any portion of the Disputed Area.

6. Undisputed Facts Regarding Plaintiffs' Historic Use of Disputed Area

It is undisputed that when plaintiffs purchased their property, they believed that "they had the right to use the Disputed Area for parking, turning, loading and related purposes, based upon a statement by the Seller of 7666 Woodrow Wilson Drive and the

---

[4] At times, the parties have referred to the defendants' property as "the Cartaya Property," a reference to a former owner of the land.

use of the Disputed Area by the Seller, the Brokers and other prospective purchasers." Since 1985, plaintiffs have continued to believe they have the right to use the Disputed Area for those purposes, and that no one had the right to interfere with that right. Plaintiffs, their guests, household residents, relatives, invitees, and workmen have openly used the Disputed Area for parking, turning, loading and related purposes since 1985. There is no evidence that anyone who used the Disputed Area since 1985 attempted to hide such use. Plaintiff Peter Kratz has regularly parked his car in the northern portion of the Disputed Area.

The parties agreed that since 1985 the Disputed Area has been visible to the owners and occupants of defendants' property. It is undisputed that since 1985 the use of the Disputed Area by plaintiffs, their guests, and workmen has been visible to the owners and occupants of defendants' property. It also was agreed that prior to 2001, the plaintiffs did not ask anyone for permission to use the Disputed Area. There is no evidence that anyone attempted to interfere with plaintiffs' use of the Disputed Area prior to 2001.

7. Use of Disputed Area By Defendants' Predecessors

The parties agreed that prior to 2001, the owners, occupants, guests and invitees of the defendants' property infrequently used the Disputed Area. The occupants of defendants' property primarily have used the area in front of their home on Woodrow Wilson Drive for parking since 1961. At some point before 2002, a predecessor of defendants installed iron bars in front of the carport, obstructing access to the parking there. At the time of trial, the bars blocked the carport. Owners of defendants' property, including the defendants, parked as many as four cars in front of their house, adjacent to Woodrow Wilson Drive.[5]

The Disputed Area provides the only vehicular access to the back of defendants' property, where their septic tank is located. The parties agreed: "In order to service the

[5] Daniel Perelmutter testified that his cars were ticketed four times in January 2005, but not since, for parking in front of his house. He explained that everyone who parked on Woodrow Wilson Drive was ticketed for a short period.

septic tank in the backyard of 7670 Woodrow Wilson Drive [defendants' property] access is helpful from the 'Disputed Area.'"

B. Easement Disputes

1. 2001

There was no dispute about plaintiffs' use of the Disputed Area until 2001. In 2001, while plaintiffs were on vacation, Claire Krane, then a part owner of defendants' property, had a survey done and discovered that her property line was in the middle of the driveway. She first parked a truck obstructing plaintiffs' garage access, then claimed a right to build a fence in the middle of the driveway. She also posted "no trespass" and "no parking" signs in the Disputed Area and interfered with repaving of the driveway and Disputed Area.

2. The Cartayas

In 2002, Ileana Cartaya and her husband Jose Luis Gonzalez purchased what is now defendants' property with the intent of making improvements. In 2002, they had a fence constructed on the property line in the driveway which obstructed plaintiffs' use of the Disputed Area.

C. Litigation

1. Plaintiffs Sue

In response to the erection of the fence blocking the driveway easement, plaintiffs filed the present action against Ileana Cartaya, Jose Luis Gonzalez and others (*Klinck v. Cartaya* (Super. Ct. L.A. County, 2002, No. BC284192). They alleged causes of action for declaratory and injunctive relief, quiet title, trespass, abatement of nuisance, and intentional infliction of emotional distress.

2. The Defendants

In 2004, the Perelmutters purchased 7670 Woodrow Wilson Drive with full knowledge of the pending action by plaintiffs regarding their rights to use the Disputed Area. They intend to make improvements to the backyard and Disputed Area. All of the original defendants were subsequently dismissed, leaving the Perelmutters, who had been amended in as defendants, as the only remaining defendants in plaintiffs' action.

3. Bench Trial

The parties presented evidence to the court in a bench trial. At the conclusion of the evidence, at the court's request, they agreed on a joint statement of undisputed facts and each presented proposed questions and answers for inclusion in the statement of decision with citation to supporting facts and law. Each side presented closing trial briefs. The parties stipulated to the parameters of the Disputed Area and the legal description. All other property owners in the area executed agreements waiving any objection to plaintiffs' continued use of the Disputed Area.

4. Trial Court Decision

The trial court signed a second proposed order, giving judgment to plaintiffs on the theories that they had an implied easement, a prescriptive easement and an easement of necessity for use of the Disputed Area. The court then issued its tentative decision. After objections lodged by defendants to which plaintiffs objected, the trial court issued a minute order. It found: "Declaratory and permanent injunctive relief is awarded to Plaintiff[s] on the complaint and cross-complaint.[6] Plaintiff[s have] an implied easement on the disputed area. The terms of the permanent injunction are attached to this decision. . . ." The court stated that its ruling was "more fully reflected" in the court ruling re submitted matter filed the same date. Judgment was apparently entered on August 3, 2006, and notice of entry of judgment was served.[7]

The court corrected that order nunc pro tunc on August 16, 2006, adding exhibits 1 and 2 (a map of the easement and legal description) to the ruling. On August 30, 2006, the trial court corrected the August 16 order nunc pro tunc by adding the second revised

---

[6] The parties have not included the cross-complaint in the record on appeal and have not briefed the nature of that pleading. The trial court described it as a cross-complaint for declaratory relief.

[7] The record on appeal does not include a document entitled "judgment." The last paragraph of the August 30, 2006 amended court order re submitted matter is labeled "Judgment." Plaintiffs do not argue that there is no appealable judgment.

order dated May 31, 2006 to the August 16, 2006 order. (We refer to this as the statement of decision.)

A. Statement of Decision

The trial court found an implied easement was created in 1951. It concluded that plaintiffs had proven by a preponderance of the evidence "that the disputed area was in existence at the time of the 1951 easement grant and was used exclusively for the residents [*sic*] parking, turning, and accessing the home." The evidence established that there was no problem with plaintiffs' use of the Disputed Area until 2002 when the Cartayas decided to eliminate the parking area in front of their home. The court found that defendants bought their property with full knowledge of this legal dispute, before they made plans to expand their backyard into the Disputed Area.

The court made alternative findings that there had been a prescriptive easement since 1985 for plaintiffs' use of the Disputed Area and an easement by necessity for turning into and out of the garage.

B. Terms of the Easement

The August 30 order sets out the rights of the respective parties to the use of the Disputed Area and the driveway easement. In general, plaintiffs' rights extend to their guests, materialmen, workmen and invitees. These rights include an easement for parking, turning, ingress and egress, loading, and unloading, so long as these activities do not unreasonably interfere with the ingress and egress to the driveway. Plaintiffs also have the right to reasonable access to other areas on defendants' property for repairs to the easement area and driveway. Plaintiffs are prohibited from using the easement area in a way that interferes with parking of other vehicles or ingress and egress of the driveway.

The terms of the easement as to defendants generally extend to their agents, employees, guests, successors, and assigns. Defendants are enjoined from interfering with plaintiffs' peaceful enjoyment of the easement, easement area and driveway. They may not erect fencing on or near the easement area; store materials in or near the easement area; park any vehicle opposite the plaintiffs' garage; park more than one

vehicle at a time in the easement area or using more than one space per vehicle; park a vehicle overnight; park a workman's vehicle for a period longer than that reasonably necessary to load and unload materials and complete work, overnight or on more than three occasions in a 24-hour period; or park a vehicle longer than 20 feet.

Defendants were recognized as having easement rights to drive one car down the driveway for transient purposes to service the rear yard of their property (e.g. for the septic system or gardening or delivery of rentals for a party) or to accommodate guests. The order specifies that plaintiffs are not required to move a car parked in the easement area to accommodate a workman or guest use by defendants. The cost of maintaining the driveway and easement area is to be shared by plaintiffs (90 percent) and defendants (10 percent). Defendants were enjoined from changing or repairing the support structure for the easement area or the easement area without the written approval of plaintiffs.

Defendants filed a timely appeal.

DISCUSSION

I

Defendants contend the trial court improperly used the preponderance of the evidence standard in finding an implied easement. They also challenge the evidence cited by the trial court as conjectural and speculative. Finally, they contend that the necessity element for an implied easement was not satisfied.

A. Implied Easements

"'An easement will be implied when, at the time of conveyance of the property, the following conditions exist: 1) the owner of the property conveys or transfers a portion of that property to another; 2) the owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use; and 3) the easement is reasonably necessary to the use and benefit of the

quasi-dominant tenement.' (*Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 141.)" (*Larsson v. Grabach* (2004) 121 Cal.App.4th 1147, 1151-1152.)

B. Standard of Proof

Defendants argue the trial court should have applied the clear and convincing evidence standard of proof. The trial court relied on *Tusher v. Gabrielsen*, *supra*, 68 Cal.App.4th 131 (*Tusher*) in finding that plaintiffs have an implied easement for use of the driveway and Disputed Area. The *Tusher* court rejected an argument that the clear and convincing standard of proof applies, and held: "We agree with the Tushers that the proper standard of proof to establish an implied easement is by a preponderance of the evidence." (*Id*. at p. 145.) Defendants cite the following passage in *Tusher*: "An easement by implication will not be found absent clear evidence that it was intended by the parties. [Citation.]" (*Id*. at pp. 141-142.) They also cite *Orr v. Kirk* (1950) 100 Cal.App.2d 678, in which the court said that the intent of the parties "must clearly appear" in order to sustain an easement by implication. (*Id*. at p. 681.)

The *Tusher* court addressed the difference between the language requiring clear evidence of the intent of the parties and the standard of proof. "[I]f the Tushers were going to tip the scales in their favor, they were going to have to present evidence that *clearly* showed a contrary intent; nothing wishy washy or uncertain would do." (*Tusher*, *supra*, 68 Cal.App.4th at p. 146.) The court equated this with the quality of the evidence rather than the quantity or weight of the evidence. (*Ibid.*) We agree with this interpretation. This use of the word "clear" in the context of implied easements is appropriate because courts are often called upon to discern the circumstances of historic usages of property to determine whether an easement should be implied. We review the record to determine whether the judgment is supported by substantial evidence. (*Tusher*, *supra*, 68 Cal.App.4th at p. 143; *Piazza v. Schaefer* (1967) 255 Cal.App.2d 328, 334.)

C. Evidence in Support of Second Element

The parties do not dispute the evidence establishing the first element for an implied easement, that at one point, the dominant and servient tenements were held by a

single owner who then conveyed one of the parcels. The Mitchells owned all of parcel 4 before selling parcel A to the Dietrichs in 1951.

Defendants argue that the second element was not supported by substantial evidence. That element requires proof that "the owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use; . . ." (*Larsson v. Grabach, supra*, 121 Cal.App.4th at pp. 1151-1152.)

There was no direct evidence of the usage of the Disputed Area between 1939 and 1955 when John Tolley purchased the original Tolley property. Plaintiffs called expert witnesses to provide opinions as to the historic usage of the Disputed Area based on the nature of the construction and surrounding area. The trial court cited testimony by plaintiffs' civil engineer, Kevin Keegan: "[G]iven the position of the disputed area near Plaintiffs' garage and the two stairway entrances to the home, it was built for the purpose of the residents parking, turning and loading or unloading of their cars."

1. Kevin Keegan

Defendants assert Keegan's testimony was "pure conjecture and speculation" and that there is no evidence that he had knowledge that would allow him to "ferret out the intent of the owners when they constructed their home some 65 years ago."

Keegan, a civil engineer, had at least 30 years of experience working on hillside areas with roadways like Woodrow Wilson Drive. He testified without objection: "[I]n my opinion, the retaining walls are an integral part of the design of the motor court, which is also an integral part of the design of the [plaintiffs'] residence." Defense counsel objected that there was no foundation for Keegan to testify further as to the probable intent of the builders of the walls, garage and home. After argument, the trial court allowed the testimony, ruling that the defense objections went to the weight rather than the admissibility of the testimony. Keegan then testified that it is likely the motor court [Disputed Area] was built as part of the original house construction. He explained

that this conclusion was based on the fact that the garage was built as part of the original construction of plaintiffs' house. He continued: "In order to provide physical access and vehicular access for automobiles going in and out of the garage, it was necessary to construct that larger area to allow for a turning area as well as a backup distance. It also provides for temporary parking and parking for loading and unloading and the other . . . operations . . . you would normally associate with a motor court area. In this particular case, there are stairways that you constructed on either side of the garage that lead up to the main house."

Keegan testified without objection that in hillside areas where the house is at a higher level than a garage, "the older homes had this particular layout where you had a garage separated by grade from the main house and connected by stairways." He testified that it is likely that the Disputed Area was built primarily for the benefit of plaintiffs' property: "Well, at the time, it's my understanding in around 1940 that this was the only residence on this particular parcel and the fact that the parcel as it's currently known as Parcel 4 was really a much larger parcel that has subsequently been subdivided." He explained further: "It tells me that the original house and parking layout and motor court and driveway were originally constructed for that single house, which is currently the [plaintiffs'] home."

On cross-examination, defense counsel established that Keegan had not talked with anyone who had knowledge of the property as it was in 1940, and had not reviewed either historical documents or photographs. Defense counsel then characterized Keegan's opinion as "a guess." Keegan objected to that characterization, and said, "It's an opinion based on my experience and the standards of practice for development of residential sites."

We disagree with defendants' characterization of Keegan's testimony as conjecture and speculation. Keegan had 30 years of experience as a civil engineer dealing with homes and roadways in hillside situations similar to the property here. He concluded that the Disputed Area was constructed at the time the garage and house were constructed based on the layout of the area and the fact that at the time, these were the

only structures on parcel 4. He concluded that the widened area that includes the Disputed Area was necessary for the use of the garage and house.

Defendants repeatedly engage in their own speculation, arguing that the physical layout of the area does not support Keegan's position. They assert, without citation to evidence, "the fact that there was this disputed area across the road from plaintiffs' property is just as consistent with the desire by the owners to have full access to what is now the Perelmutters' property as it was for use by the residents of the house on what is now plaintiffs' property." Defendants ask, "[I]f the intent of the owners was to use the disputed area as parking for the house, why go to the effort of building a garage on the plaintiffs' property immediately opposite the disputed area." Defendants also argue that the presence of an alternative driveway and parking pad around the far right side of the property, on the same level as the plaintiffs' house, indicates that the disputed area was not primarily intended as parking for the residents of the plaintiffs' house. They argue that an intent that the Disputed Area be used by the owners of plaintiffs' house cannot be inferred from the double stairways leading from the garage to the house because the stairs could be used by someone parking *in* the garage.

Defendants rely on evidence (exh. 213) that stairs were built in the retaining wall to access the gully at the rear of what is now their property. Based on evidence that the rear of their property today is covered by thick brush and trees (exhs. 31d and 31e), they speculate that in 1951, since there was no house on their property, "undoubtedly the Perelmutters' entire property was thick brush and trees." From this, they argue that the Disputed Area must have been intended to allow the predecessor owners of their property to do fire safety brush clearance or to pick fruit. This is based on Tolley's testimony that he retained easement rights to defendants' property when he sold it so he could access fruit trees there.

Without any citation to evidence, defendants speculate that since the owners built a home on plaintiffs' property, "it would also appear likely that the owners may have considered building a home on the rest of the property (Parcel B). If so, the disputed area would absolutely be necessary for access of the construction crews to the back of Parcel

B." Defendants next argue that lifestyles were different in 1940 or 1951, families rarely had more than one car, and conclude that the Mitchells and prior owners did not need parking for "the armadas found at many homes today." No evidence is cited to support this speculation.

Defendants are attempting to reargue the evidence and ask us to overturn the court's judgment based on speculation unsupported by evidence. The trial court credited Keegan's opinion. It constituted substantial evidence which may not be reweighed on appeal.

2. Richard Widmer

Plaintiffs' surveyor, Richard Widmer, testified that the material used in constructing the retaining wall around the Disputed Area was old and of a type used before the 1950's. He concluded the Disputed Area was created in 1939, at the same time as the garage. The court asked Widmer the basis for his conclusion. Widmer said the retaining walls holding up the Disputed Area were reinforced with smooth core rebar, an old product used before the 1950's. He said, "I have to make some assumptions that the walls are of the character. This is stating that something was constructed. And so as a best guess, professional guess, that's what I would determine."

The court asked whether he had investigated other places to determine which rebar was used or when they were built. Widmer said, "Absolutely. When we're doing surveys for public lands, for reestablishing section corners, the stones that they place on those corners, part of the surveyor's job is to determine the age of those stones and the character of those stones and if they agree with the legal description at the time." The trial court cited Widmer's opinion in the statement of decision.

Widmer testified that he did not have a background in geology or in determining the age of masonry, but that he had 35 years of experience in determining the approximate age of stones to determine whether they agree with monuments described in legal documents. The trial court asked: "When you're going out and determining what easements existed at a variety of time periods that are going to be historical, you do have to make a determination of, for example, when these monuments were constructed in

order to determine if they were part of the easement at the time, right?" Widmer said that was correct. He explained that he does that "By looking at bricks, rebar, and . . . a lot of it is just straight logic . . . there was something constructed, how would that be constructed to get to this Point A to Point B?" In answer to the court's question, he reiterated that bricks and rebar would be among the types of monuments he would use to make that determination.

He testified: "The retaining walls along the southwest side of the road, I believe, are part of the original road. As far as the width of the road, the construction on the [plaintiffs'] property was done subsequent to this easement. So as far as how wide that road was originally, it's hard to say. I've said that—I believe that the south side of that retaining wall defines the road because it's the same age as the retaining wall." Widmer testified that he believes the Disputed Area is the location of the original easement due to the age of the walls and the consistency of the walls.

Defendants argue: "[D]espite Mr. Widmer's admission that he had no knowledge, experience or training in the dating of retaining walls, the court relied solely upon his expert testimony concerning the age of the retaining walls to conclude that 'the disputed area was created in 1939 and that it was likely built at the same time as Plaintiffs [*sic*] garage.' (A 236)" This argument mischaracterizes Widmer's testimony. As we have seen, Widmer laid a foundation for his opinion, explaining how he determines the age of rebar and other features in determining whether monuments are as described in legal documents.

We conclude that the testimony given by Keegan and Widmer constitutes substantial evidence to support the trial court's conclusion that in 1951 the Disputed Area was used by the residents of plaintiffs' house in a manner suggesting it was intended that their use would continue. This conclusion is further supported by the declaration of John Tolley, exhibit 24 at trial. Tolley declared that as of 1955, the driveway provided access, ingress, and related uses to plaintiffs' property, as well as ingress and egress to the Vosburgh property (parcel 3), the original Tolley property, and the Dwyer property (parcel 1). He said: "In addition to providing ingress and egress to the four above-

mentioned properties, the Driveway provided related uses, including: a turning radius into the garage of [plaintiffs'] Property; a turning radius for residents of and visitors to the [plaintiffs'] Property so that they could turn their cars around to exit the property and not have to back up the narrow driveway to Woodrow Wilson drive, more than 100 yards uphill (the Driveway is the only access to the [plaintiffs'] home and garage), as well as a few parking and loading/unloading spaces for [plaintiffs'] Property and for the Original Tolley property."

Tolley declared that the dimensions of the driveway at present were the same as they were in 1955, including the Disputed Area, which was 30 feet wide in front of plaintiffs' garage. He said: "The ancient retaining walls that support the Driveway (particularly in the vicinity of the area opposite the garage at [plaintiffs'] Property) are the same retaining walls that existed in 1955 when I first purchased the Original Tolley Property and *which had undoubtedly existed for quite some time prior to 1955*." (Italics added.)

The trial court could infer from the evidence presented at trial, particularly Tolley's declaration, that the Disputed Area was used by the residents and guests of plaintiffs' property in 1951 in much the same way as it was used after plaintiffs' purchase in 1985. This satisfied the second element to establish an implied easement.

D. Third Element

As we have discussed, the third element of the test for an implied easement is whether the easement is reasonably necessary to the use and benefit of the dominant tenement. (*Larsson v. Grabach*, *supra*, 121 Cal.App.4th at p. 1152.) Defendants argue that plaintiffs had six parking spaces on their property aside from those in the Disputed Area, until 2002 when they remodeled. They also complain that plaintiffs are storing exercise equipment in their garage rather than parking two cars in it.

Defendants point out that a quotation from *Owsley v. Hamner* (1951) 36 Cal.2d 710, 720, cited by the trial court in its statement of decision, does not appear in that opinion. Although the quotation is not found in *Owsley v. Hamner*, *supra*, 36 Cal.2d 710, the trial court correctly applied a broad definition of necessity in the context of implied

easements. The Supreme Court has explained the third element for implied easements: "It must be remembered that easements, such as we have here, do not fail to be necessary merely because there are other means of access, that is, they do not have to be the only means of access. (*Rees v. Drinning* [(1944)] 64 Cal.App.2d 273; *Mayer v. Hazzard* [(1935)] 10 Cal.App.2d 1, 3." (*Owsley*, at p. 720.) In *Larsson v. Grabach*, *supra*, 121 Cal.App.4th 1147, the Court of Appeal explained: "The strict necessity required for an easement by necessity is not required for an easement by implication. The test is whether the easement is reasonably necessary for the beneficial enjoyment of the property conveyed. (*Owsley v. Hamner*[, *supra*,] 36 Cal.2d 710, 178-719.)" (*Larsson*, *supra*, at p. 1152.)

Tolley's declaration (exh. 24) and plaintiff Klinck's testimony at trial constituted substantial evidence to support the trial court's conclusion that the use of the Disputed Area is reasonably necessary for the beneficial enjoyment of plaintiffs' property. It was necessary to provide access to plaintiffs' garage, and for guests and workmen to park and turn around.

There was substantial evidence to support the implication of an easement for plaintiffs' use of the Disputed Area. In light of this conclusion, we need not and do not address defendants' arguments concerning the trial court's alternative findings that plaintiffs had proven a prescriptive easement and easement by necessity.

II

Defendants argue the easement granted by the trial court amounts to an award of possessory rights, which is disfavored. They compare the rights given plaintiffs to cases involving an encroaching wood shed, fencing, or landscaping. Here, defendants argue plaintiffs were given permanent parking rights on defendants' land, and that the easement thus overburdens the servient tenement and denies the defendants the right to develop their property as they see fit. They argue the easement given plaintiffs exceeds the easement created in 1939 and 1951 because of the restrictions of their use of the Disputed Area.

The cases cited by defendants do not support their argument in that each involved a claim to a prescriptive easement for use which was akin to a possessory right. *Kapner v. Meadowlark Ranch Assn*. (2004) 116 Cal.App.4th 1182, involved a fence that encroached on a road right-of-way on private land. The court rejected the claim of the builder of the fence to a prescriptive easement to the land on the right-of-way within the boundary of his fence. *Harrison v. Welch* (2004) 116 Cal.App.4th 1084, concerned a woodshed and landscaping that encroached on a neighbor's land. The court rejected the claim to a prescriptive easement to maintain the woodshed and landscaping. In *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, the Court of Appeal rejected a claim of prescriptive easement to maintain a fence that encroached on neighboring property. Finally, in *Mesnick v. Caton* (1986) 183 Cal.App.3d 1248, the court rejected a claim of prescriptive easement to land enclosed by an encroaching fence.

In each of these cases, the encroaching landowner sought to acquire the equivalent of fee ownership without satisfying the requirements for adverse possession. Here, the trial court's order allows the defendants the same uses of the Disputed Area that were historically enjoyed by defendants' predecessors, as established by the evidence presented at trial: they may use the Disputed Area to access their backyard to service the septic tank, for gardening, or for delivery of rentals for a party, and they have limited guest parking there if it does not interfere with plaintiffs' rights.

"'"The extent of an easement created by implication is to be inferred from the circumstances which exist at the time of the conveyance and give rise to the implication. Among these circumstances is the use which is being made of the dominant tenement at that time. Yet it does not follow that the use authorized is to be limited to such use as was required by the dominant tenement at that time. It is to be measured rather by such uses as the parties might reasonably have expected from the future uses of the dominant tenement. What the parties might reasonably have expected is to be ascertained from the circumstances existing at the time of the conveyance. It is to be assumed that they anticipated such uses as might reasonably be required by a normal development of the dominant tenement."' (*Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 9, quoting from Rest.,

Property, Servitudes (1944) § 484, com. b, p. 3022.)" (*Larsson v. Grabach, supra,* 121 Cal.App.4th at p. 1153.)

We recently explained the limited nature of easement rights in a case involving an easement for parking and garage purposes in *Blackmore v. Powell* (2007) 150 Cal.App.4th 1593. The appellants argued that the trial court's interpretation of the express easement amounted to an award of an ownership interest equivalent to a fee simple in their property. In affirming the trial court, we explained: "'"An easement involves primarily the privilege of doing a certain act on, or to the detriment of, another's property." [Citation.] An easement gives a nonpossessory and restricted right to a specific use or activity upon another's property, which right must be *less* than the right of ownership. [Citation.]' (*Mehdizadeh v. Mincer*[, *supra*,] 46 Cal.App.4th 1296, 1306, quoting *Wright v. Best* (1942) 19 Cal.2d 368, 381.) Thus, '[t]he owner of the easement is not the owner of the property, but merely the possessor of a "right to use someone's land for a specified purpose . . . ."' (*Cody F. v. Falletti* (2001) 92 Cal.App.4th 1232, 1242, quoting *Long Beach Unified Sch. Dist. v. Godwin Liv. Trust* (9th Cir. 1994) 32 F.3d 1364, 1368; see *Kazi v. State Farm Fire & Casualty Co.* (2001) 24 Cal.4th 871, 881 [An easement 'represents a limited privilege to use the land of another . . . , but does not create an interest in the land itself.'].)" (*Blackmore v. Powell, supra,* 150 Cal.App.4th at p. 1598.) We pointed out that the appellants retained "'every incident of ownership not inconsistent with the easement and the enjoyment of same.'" (*Id.* at p. 1599, quoting *Dierssen v. McCormack* (1938) 28 Cal.App.2d 164, 170.) But we pointed out that the appellants could not use their property "'in a way that obstructs the normal use of the easement.'" (*Blackmore,* at p. 1599, quoting 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 412, p. 484.)

As discussed above, the trial court crafted a detailed order setting out plaintiffs' rights to use the driveway and Disputed Area, with the limitation that they could not interfere with ingress and egress on the driveway. Plaintiffs were given reasonable access to defendants' property to repair the easement and driveway, and are required to pay 90 percent of the costs of maintaining the driveway and easement. Defendants were

given limited rights to use the Disputed Area to access the backyard of their home for service or repair, or for guest parking if it does not interfere with plaintiffs' uses.

This does not amount to the award of a possessory interest. It simply means that defendants cannot build or landscape on the Disputed Area, which would obstruct plaintiffs' rights. Defendants purchased their property with full knowledge of plaintiffs' claims of right to use the Disputed Area as the court eventually ordered following the presentation of substantial evidence of their historic use of the area.

DISPOSITION

The judgment is affirmed. Plaintiffs are to have their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.